

STATE OF INDIANA

FILED

INDIANA UTILITY REGULATORY COMMISSION

JUN 15 2001

In the Matter of the Petition of)
Indiana Bell Telephone Company,)
Incorporated d/b/a Ameritech Indiana)
Pursuant to I.C. 8-1-2-61 For a Three)
Phase Process For Commission)
Review of Various Submissions of)
Ameritech Indiana to Show Compliance)
with Section 271(c) of The Telecommunications)
Act of 1996)

INDIANA UTILITY REGULATORY COMMISSION

Cause No. 41657

**AMERITECH INDIANA'S NOTICE AND REQUEST
FOR REVIEW AND REVERSAL OF ALJ-EDR-1**

Indiana Bell Telephone Company, Incorporated d/b/a Ameritech Indiana, by counsel, and consistent with the procedures set forth in the Commission's March 19, 2001 Order in this Cause, requests that ALJ-EDR-1 (hereinafter "EDR-1") be reversed or vacated on review.

INTRODUCTION AND BACKGROUND

EDR-1 is an ALJ decision entered under the informal expedited dispute resolution procedures adopted in the Commission's March 19, 2001 Order in this Cause. EDR-1 purports to construe the resale obligations of the Telecommunications Act of 1996 ("TA96") as they apply to Ameritech Indiana and Ameritech Advanced Data Services of Indiana, Inc. ("AADS") in light of the D.C. Circuit Court of Appeals' ASCENT decision.¹ EDR-1 relies on arguments that were raised for the first time by the ALJ.

¹ *Association of Communications Enterprises v. FCC et al.*, 235 F.3d 662 (D.C. Cir. 2001) ("ASCENT").

As the Commission knows, TA96 imposes two distinct resale obligations on incumbent local exchange carriers (“ILECs”), such as Ameritech Indiana. These obligations are found in 47 U.S.C. § 251(b)(1) and in 47 U.S.C. § 251(c)(4) (hereinafter “Section (b)(1)” and “Section (c)(4)”). Section (b)(1) imposes a duty on all local exchange carriers to permit the resale of its *telecommunications services*. Section (c)(4) imposes an additional obligation on *incumbent* local exchange carriers, like Ameritech Indiana. Under Section (c)(4), an ILEC, such as Ameritech Indiana, has the duty to offer for resale *at wholesale rates* any *telecommunications service* that the ILEC provides *at retail* to subscribers who are not telecommunications carriers. In summary, Section (b)(1) imposes a “resale duty” while Section (c)(4) imposes a “wholesale resale duty.”

Accordingly, while Ameritech Indiana is subject to both Section (b)(1) and Section (c)(4), both obligations do not apply to every service Ameritech Indiana provides. Under the TA96 framework, only *telecommunications services* offered by Ameritech Indiana are subject to the resale duties. Non-telecommunications services are not required to be resold. Likewise, not all *telecommunications services* offered by Ameritech Indiana are subject to the “wholesale resale duty.” Only those telecommunications services that are offered at retail to subscribers who are not telecommunications carriers must be made available for “wholesale resale.” For example, information services are not subject to either the Section (b)(1) or the Section (c)(4) duty because information services are not telecommunications services.² Nor are they subject to regulation.

² “Information service” is defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the

AADS is an affiliate of Ameritech Indiana. One of the services AADS provides is asymmetrical digital subscriber line (“ADSL”) Transport Service to Internet Service Providers (“ISPs”). *Supplemental Response Q-67*, Cause No. 41660 submitted to the Commission on August 25, 2000. DSL is a transmission service that transports user data at high speed between a customer’s premise and a digital switching system or remote terminal. *See Information Age Dictionary*, Jerry Whitaker, Harold Winard (1992), p. 81. “Asymmetrical” DSL means that the transfer speed is not same for incoming and outgoing data. ISPs enhance the ADSL service they purchase from AADS with Internet Service and sell the combined offering (as high speed Internet Service) to retail end users. AADS provides ADSL Transport Service to many ISPs, including over 80 unaffiliated companies such as America Online. *Transcript*, Cause No. 41660, A-153, lines 17-25; A-155, lines 1-5.³ AADS also sells ADSL Transport Service to an affiliated ISP but must do so on an arms length basis. *Re Petition of AADS*, Cause No. 41660 (IURC 3/19/01), p. 18. The Commission has prohibited AADS from providing retail local exchange service to the public. *Id.* AADS is not a party to this proceeding and did not have notice of, nor participate in, the informal dispute resolution process that resulted in EDR-1. To the extent EDR-1 purports to interpret obligations of an entity

management of a telecommunications service.” 47 U.S.C. §153(41).

³ At the AADS CTA hearing on August 29, 2000 in Cause No. 41660, Mr. Lincoln Brown, then the director of regulatory for the advanced services affiliate, testified on cross-examination that “my customers are exclusively ISPs.” *Transcript*, p. A-47, line 24. Mr. Brown’s statement is not an isolated incident; Mr. Brown repeatedly testified on cross-examination that AADS would only serve ISPs and some large businesses. *E.g., Id.*, p. A-46, lines 15-25 (Mr. Brown testified, “we currently market our DSL services exclusively to Internet service providers. I do not market DSL service directly to end users.”). Furthermore, when questioned on cross-examination regarding provision of service to end-user customers, Mr. Brown clearly indicated that the service offered to end-users would be provided by Ameritech Interactive Media Services, Inc. (“AIMS”), an information provider not subject to regulation. *Id.*, p. A-59, lines 16-19.

that is not a party to this proceeding, the minimum process due would be to provide notice and opportunity to be heard.⁴

Finally, in the ASCENT decision, the D.C. Circuit Court found that the Section (c)(4) wholesale obligation - the resale duty that applies only to ILECs - could not be avoided via the provision of service through a separate subsidiary.⁵ Ameritech Indiana is not trying to avoid its obligations under Section (c)(4) via the provision of ADSL Transport Service to ISPs through AADS or through the provision of high speed Internet Service to end users by Ameritech Interactive Media Services, Inc. ("AIMS"). These services -- ADSL Transport Service to ISPs and high speed Internet Service to end users -- are not subject to the provisions of Section (c)(4) regardless of the identity of the provider, as set forth more fully below.

EDR-1

EDR-1 finds that under the D.C. Circuit Court of Appeals ASCENT decision, AADS "has the same obligations under Section 251(c) as Ameritech Indiana." EDR-1, p. 4. On this foundation, EDR-1 further finds that Section 251(c) applies to every service offered by AADS, including ADSL

⁴ Ameritech Indiana is not responding on behalf of AADS. The arguments made herein regarding the AADS issues are presented because these matters have been misconstrued to the detriment of Ameritech Indiana.

⁵ The provision of ADSL Transport Service via a separate affiliate was required by the Merger Conditions associated with the FCC's approval of the stock transaction that gave SBC Communications, Inc. ownership of Ameritech and all of Ameritech's subsidiaries including both Ameritech Indiana and AADS. Memorandum Opinion and Order, *Re Ameritech Corp. and SBC Communications Inc.*, CC Docket No. 98-141 (FCC 99-279) (rel. Oct. 8, 1999).

Transport. EDR-1 concludes that ADSL Transport Service is a Section (c)(4) retail telecommunications offering that must be included in the third party OSS test which is the subject of this proceeding. These latter two findings are incorrect. EDR-1 also fails to address material issues raised in Ameritech Indiana's brief. In this respect EDR-1 is contrary to law. Therefore, EDR-1 should be reversed or vacated.

ARGUMENT

I. The EDR-1 Conclusion That The Section (c)(4) Wholesale Resale Obligation Applies To ADSL Transport Service To ISPs Contravenes The Plain Statutory Language of TA96 And Controlling FCC Precedent.

As explained above, the Section (c)(4) wholesale resale obligation is one of two resale obligations imposed by TA96 on Ameritech Indiana. It does not apply to every service offered by Ameritech Indiana. Nor does it apply to every *telecommunications* service offered by Ameritech Indiana. Rather, the Section (c)(4) wholesale resale obligation applies only to those telecommunications services that are offered at retail to subscribers who are not telecommunications carriers. Thus, while AADS may have "the same obligations under [Section (c)(4)] as Ameritech Indiana," (EDR-1, p. 4) this wholesale resale obligation does not extend to every telecommunications service provided by AADS.

Regardless whether the service is provided by Ameritech Indiana or AADS, in order for the Section (c)(4) wholesale resale obligation to apply to ADSL Transport Service to ISPs, this service must be provided directly to retail end users for two reasons. First, Section (c)(4) applies only to telecommunications services offered at retail to subscribers who are not carriers. Second,

“telecommunications services” for purposes of Section (c)(4) means only retail offerings “directly to the public.” As the Federal Communications Commission (“FCC”) has explained, in its ordinary meaning, “retail” denotes “direct sales of a product or service to the ultimate consumer for her own personal use or consumption.” *Second Report and Order, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 19237, 19243, ¶13 (1999) (“Second Advanced Services Order”) (quoting *Webster’s Deluxe Unabridged Dictionary*, 1545 (2d ed. 1987) and *Black’s Law Dictionary*, 1315 (6th ed. 1990)). Since ISPs are not retail end users, ADSL Transport Service provided to ISPs is not “offered at retail;” nor is it provided “directly to the public.” Therefore, the Section (c)(4) wholesale resale obligation does not apply to ADSL Transport Service provided to ISPs, regardless whether it is provided by Ameritech Indiana or AADS.

The EDR-1 decision to the contrary violates both the plain statutory language of TA96 (quoted above) and controlling FCC precedent. In its *Second Advanced Services Order*, the FCC determined that “DSL services sold to [ISPs] are not targeted to end-user subscribers, but instead are targeted to [ISPs]” who combine this service “with an enhancement, Internet service.” 14 FCC Rcd at ¶19245, ¶17. As the FCC further found, the resulting combined service is an unregulated information service offered by the ISP to the ultimate end-user. *Id.* The FCC incorporated this determination in its rules, which provide that **“advanced telecommunications services sold to [ISPs] as an input component to the [ISP’s] retail Internet service offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale at wholesale rates.”** 47 C.F.R. § 51.605(c) (emphasis added). Accordingly, the Section (c)(4) wholesale resale obligation does not extend to unregulated

information service offerings. Since neither the FCC decision nor the FCC rule is limited to ISPs that are unaffiliated with an ILEC, no distinction may be made on the grounds that the ADSL Transport Service at issue here is offered to unaffiliated ISPs as well as to an affiliated ISP.

II. The EDR-1 Conclusion That Ameritech Indiana Is Attempting To Avoid Its Clear Section 251 Obligations By Using An Affiliated ISP To Provide The Combined Offering To Retail End Users Fails To Recognize That The Combined Offering Is An Information Service, Not A Telecommunications Service Subject To Resale And Ignores The Fact That The “Unenhanced Offering”, i.e., ADSL Transport Service, Is Available For Resale Under Section 251(b)(1).

EDR-1 concluded that “Ameritech Indiana is attempting to avoid its clear section 251 obligations by reliance on its creative corporate structure” that uses an affiliated ISP to provide the “combined service offering” directly to the public. EDR-1, p. 5. The section “251 obligations” referred to in EDR-1 include both the Section (b)(1) resale obligations and the Section (c)(4) wholesale resale obligations.

The conclusion that Ameritech Indiana is attempting to avoid its Section (b)(1) resale obligations is not correct. Ameritech Indiana acknowledges that the “unenhanced offering,” i.e., ADSL Transport Service, must be made available for resale under Section (b)(1) regardless whether it is offered by Ameritech Indiana or AADS. And the service is made available for resale today. *See Ameritech Indiana’s Reply To Joint CLEC Petition*, p. 7.

The conclusion that Ameritech Indiana is attempting to avoid its Section (c)(4) wholesale resale obligations is also incorrect. In particular, it confuses the “unenhanced offering” – ADSL

Transport Service – with the “enhanced offering” -- ADSL Transport Service combined with Internet Service, i.e., high speed Internet service. As discussed above, controlling FCC precedent holds that the combined service offering is an “information service” and not a “telecommunications service.” *Second Advanced Services Order*, 14 FCC Rcd 19237, at 19243, ¶13; 47 C.F.R. §51.605(c). Since “information services” are not subject to the Section (c)(4) wholesale resale obligation, Ameritech Indiana is not avoiding its Section (c)(4) obligation when the ISP, affiliated or not, provides the information service directly to the public. In simple language, there is no Section (c)(4) obligation on *any entity* to resell at wholesale rates the combined information service of ADSL Transport Service and Internet Service. Therefore, Ameritech Indiana cannot be “avoiding its Section (c)(4) obligation” when its affiliated information service provider (AIMS) offers the combined information service.

EDR-1 also confuses the “un-enhanced offering” with the combined service by suggesting that the combined offering somehow runs afoul of (i) Ameritech Indiana’s express commitment to assure the deployment of ADSL Service by AADS at the selected wire centers; and (ii) the Commission’s AADS CTA Order. Neither the assurance regarding the deployment of ADSL service nor the Commission’s AADS CTA Order alters the controlling 1999 FCC holding and regulation that the combined offering is an information service and not subject to the Section (c)(4) obligation.

Notably this aspect of EDR-1 goes beyond the scope of the briefs presented in the EDR and is based on arguments that were raised for the first time by the ALJ. EDR-1 is unreasonable on this basis as well. Given the extremely expedited nature of the informal EDR process established in this

Cause (ruling in 11 days), decisions should not extend to matters that have not been briefed, nor engage in interpretation and speculation about the meaning of other orders or the impact on non-EDR parties without evidentiary and legal basis and the opportunity of affected parties to be heard. Accordingly, review is necessary to assure a decision-making process consistent with due process, the Commission's statutory obligations and sound regulatory policy.⁶

III. The EDR-1 Conclusion That The Provision Of The Combined Offering By An Affiliated ISP Runs Afoul Of The AADS CTA Order Fails To Recognize That This CTA Removed The Joint Marketing Restriction.

EDR-1 (p, 4) emphasizes that AADS, and thus Ameritech Indiana, are obligated to assure that the combined offering is made available at each of the wire centers identified in a confidential document in the OI 2000 proceeding (Cause Nos. 40785-S1, 40849 and 41058). While no specific citation is provided for this obligation, presumably EDR-1 is referring to the Commission's granting of AADS's request that the Commission remove the joint marketing restriction that previously applied to AADS.

In the AADS CTA proceeding (Cause No. 41660), AADS requested that the Commission remove a joint marketing restriction that previously applied to AADS and the Commission granted this request. In so doing, the Commission assured that once AADS deployed ADSL Transport

⁶ E.g., IC 8-1-1-5 (the Commission shall in all controversial proceedings be an impartial fact-finding body; any analysis prepared by the Commission staff shall be subject to cross-examination); IC 8-1-2-51 (the recommendations of ALJs and other agents shall be advisory only and shall not preclude the taking of further testimony, if the Commission so orders, nor further investigation); IC 8-1-2-72 (Commission orders shall not be altered without notice and opportunity to be heard).

Service at each of the selected wire centers, at least one ISP (the Ameritech affiliated ISP) would be available to provide the combined service. Obviously, neither AADS nor Ameritech wish to make investments that will not be utilized.⁷

However, the removal of the joint marketing restriction does not transform the combined offering from an information service into a telecommunications service regardless whether the combined offering is offered by Ameritech, AADS or an ISP affiliate. Therefore, EDR-1 wrongly concludes that the provision of the combined service offering by an affiliated ISP somehow runs afoul of the Commission's Order granting a CTA to AADS and should be vacated.

IV. Review Is Warranted Because EDR-1 Fails To Address Material Issues In Dispute.

AADS also provides ADSL Transport Service to large business customers who in turn enhance it with their own facilities to support a Local Area Network. In the EDR, Ameritech Indiana acknowledged that the provision of ADSL Transport Service directly to large business customers for their own use or consumption was the provision of a telecommunications service *at retail* and subject to Section (c)(4). *Ameritech Indiana's Reply to Joint CLEC Petition*, pp. 4, 5. Ameritech Indiana explained that it is neither practical nor necessary to include this more individualized offering to this narrow class of customers in the third party OSS test. *Id.* at 5 (citing Affidavit of John Habeeb and Ameritech Statement of Position). EDR-1 ignores this issue and is contrary to law.

⁷ If this restriction had not been removed, AADS could offer ADSL Transport Service at each of the selected wire centers but that would not necessarily mean that an ISP would find it economically advantageous to offer the combined information service to retail end users in every area, particularly the smaller communities and more rural areas.

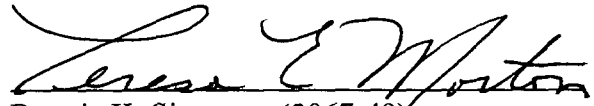
The Commission “must in one way or another address each issue raised by the parties appearing before it.” *Hidden Valley Lake Prop. Owners v. HVL Util.* , 408 N.E.2d 622, 626, *reh. denied* 411 N.E.2d 1262 (Ind. Ct. App. 1980).⁸

CONCLUSION

EDR-1 unlawfully expands the Checklist 14 in violation of the plain statutory language of TA96 and controlling FCC regulation specifically holding that neither (i) ADSL service to ISPs nor (ii) the combined offering of ADSL Service and Internet Service, are subject to the Section (c)(4) wholesale resale obligation. For the reasons set forth above, EDR 1 is contrary to law and sound regulatory policy requiring informed decision-making and should be vacated.

⁸ The record is clear that AADS only provides ADSL Transport Service to large business customers, not to other retail customers. See this Brief, footnote 3. To the extent EDR-1 finds that AADS provides ADSL transport to retail customers, other than large businesses, it is contrary to the facts. Affidavit of John Habeeb, ¶¶20-21.

Respectfully submitted,



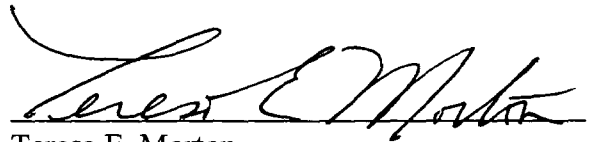
Bonnie K. Simmons (2067-49)
AMERITECH INDIANA
240 North Meridian Street, Room 1831
Indianapolis, Indiana 46204
Telephone: (317) 265-3676

Teresa E. Morton (14044-49)
BARNES & THORNBURG
11 South Meridian Street, Suite 1313
Indianapolis, Indiana 46204
Telephone: (317) 231-7716

Attorneys for Indiana Bell Telephone
Company, Incorporated d/b/a Ameritech
Indiana

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 15, 2001, the foregoing was served electronically upon the Ameritech 271 distribution list at ameritech271@urc.state.in.us.



Teresa E. Morton